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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 371 (RA)

5 JOHN GALANIS, et al.,

6 Defendants.

7 -----x

8 New York, N.Y.

9 April 13, 2018

12:08 p.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13
14 APPEARANCES

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Southern District of New York

16 BY: BRENDAN FRANCIS QUIGLEY

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I4ddgalc

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I4ddgalc

1 THE CLERK: In the matter of the United States v.
2 Galanis, et al., docket number 16 Cr. 371, counsel please state
3 your name for the record.

4 MR. QUIGLEY: Good afternoon, your Honor. Brendan
5 Quigley, Rebecca Mermelstein and Negar Tekeei for the United
6 States.

7 THE COURT: Good afternoon.

8 MR. TREMONTE: Good afternoon, your Honor. Michael
9 Tremonte, Noam Biale and Emma Spiro for Mr. Hirst, who is
10 present to my right.

11 THE COURT: All right. Good afternoon.

12 MR. TOUGER: Good afternoon, your Honor. David
13 Touger, T-o-u-g-e-r, for Mr. Galanis, who has still not been
14 produced.

15 THE COURT: OK. And are you waiving his presence for
16 purposes of today?

17 MR. TOUGER: I have no choice but to do that.

18 THE COURT: All right.

19 MR. TOUGER: I certainly would have liked him to be
20 here, but I certainly have no choice.

21 THE COURT: Any word on when he is going to get here?

22 MR. TOUGER: All I know, your Honor, is that as of
23 this morning he was still in Los Angeles.

24 MR. QUIGLEY: Judge, we were informed by the marshals
25 this morning that he will be arriving in the district on

I4ddgalc

1 Wednesday.

2 THE COURT: Wednesday. OK. All right. Thank you.

3 MR. TOUGER: I find that to be suspect.

4 THE COURT: I don't know if you have a basis for it
5 being suspect. You made a decision to keep him there.

6 MR. TOUGER: Your Honor, I didn't make a decision to
7 keep him there. I made a decision to keep him there until
8 April 1st. That was the only decision I made. And that was
9 based on that the BOP would give him the tests, the medical
10 tests, to find out --

11 THE COURT: Everyone can be seated.

12 MR. TOUGER: To find out if he has cancer, which they
13 never did. So we still have an inmate who has been told he
14 possibly has prostate cancer for two-and-a-half months now and
15 the BOP hasn't given him the medical attention that their own
16 doctors ordered that they give him. The only reason I delayed
17 him coming here, your Honor, is so that those tests could be
18 done, he could recover from the surgery, and get here a month
19 before trial starts. That was under the circumstances.

20 So what has actually happened is that they haven't
21 done any of the medical tests. He is still sitting there with
22 a possible cancer growing in his body, going from curable to
23 deathly, and they are now 13 days late and counting from when
24 we asked him to be here. So there is no way this Court can say
25 I consented to any of this.

I4ddgalc

1 THE COURT: Let me ask you a question. Have you
2 spoken to the marshals or the BOP, or has the government here,
3 to see if while he is here he can get those tests done?

4 MR. TOUGER: Your Honor, when I talked to the
5 marshals, they are less than giving of information about
6 anything.

7 THE COURT: All right.

8 MR. TOUGER: They always say we'll do it and security
9 will get it done. There is no doubt that you can get that done
10 here in New York City.

11 My application -- if you want to get into the
12 application?

13 THE COURT: No. We can talk about it later and I am
14 going to talk about the request for adjournments. But I'll
15 tell you one thing. I was planning on sitting half days on
16 Fridays. I don't usually sit on Fridays, but half days on
17 Fridays, given I think the ambiguity in terms of how long this
18 case is going to take. But on a certain Friday I cannot sit.
19 I can work around the schedule. And I can ask the government
20 and will ask the government to work with, you know, the
21 marshals and the BOP to get him the tests once he gets here.

22 MR. TOUGER: The only problem, your Honor, it is not
23 for the tests. It is the surgery. He has been told there is
24 at least a two-week recovery period for that surgery. They
25 have to cut him open. They've already done all the blood tests

I4ddgalc

1 and stuff, and that's come back that he needs this surgery. We
2 are not talking about --

3 THE COURT: But it is a biopsy. You can do a biopsy
4 in a day, right?

5 MR. TOUGER: The surgery can be done in a day, but we
6 are not talking about a 24-year-old man, your Honor, we are
7 talking about a man in his mid-70s getting a surgical
8 procedure. The doctors have told him that they would want him
9 in the hospital for two weeks. That's what he was told.

10 THE COURT: All right. OK.

11 MR. QUIGLEY: Your Honor, we'll talk to BOP as soon as
12 Mr. Galanis gets here. I understand he is going to be housed
13 at MDC, and we will talk to them about arranging a biopsy for
14 him on Friday.

15 THE COURT: All right. I want to be kept apprised of
16 the health issues. I mean, as I'll address the requests for
17 adjournments separately -- and I do want to talk about
18 Ms. Morton separately. I think we should do that outside of
19 the hearing of everyone else, if you agree?

20 MR. MORVILLO: Yes, your Honor.

21 THE COURT: OK. So that we can just talk frankly. In
22 light of the sensitivity of medical issues, I thought it would
23 be better to do that in the robing room.

24 OK. So the rest of the appearances. Mr. Schwartz.
25 Ms. Notari

I4ddgalc

1 MS. NOTARI: Paula Notari on behalf of Mr. Bevan
2 Cooney.

3 MR. SCHWARTZ: Good afternoon, your Honor. Matthew
4 Lane Schwartz for Devon Archer, who is present in the
5 courtroom.

6 THE COURT: All right. Good afternoon to all of you.

7 MR. MORVILLO: Good afternoon, your Honor. Gregory
8 Morvillo and Caitlin Sikes and Savannah Stevenson on behalf of
9 Ms. Morton, who is not here today.

10 THE COURT: OK. Good afternoon.

11 So, we have a lot to cover. I am not going to cover
12 all of the outstanding issues but I am going to cover as many
13 as I can and then we'll schedule what's left for another day.

14 First, I know that the defendants need to be arraigned
15 on the Superseding Indictment. Obviously, a number of them are
16 not here. Two of them are here. Do you want to arraign them
17 now or do you want to do it all later?

18 MR. QUIGLEY: Your Honor, the defendants can do
19 whatever they want to do. I think it just might make sense to
20 do them all at one time.

21 THE COURT: OK. So, we'll do them all at the final
22 pretrial conference or on the first day of trial before jury
23 selection.

24 So, first what I want to do is I want to turn to the
25 government's motion to admit evidence pursuant to Rule 404(b).

I4ddgalc

1 In its notice to defendants, the government has indicated that
2 it intends to introduce evidence with respect to nine topics.
3 The government also argues, however, that all of this evidence
4 constitutes direct evidence of the conspiracy and that it made
5 its 404(b) notice in an exercise of caution.

6 I've obviously read all of your letters. Is there
7 anything else anyone wants to add with respect to the 404(b)
8 arguments?

9 All right. OK. So --

10 MR. SCHWARTZ: One of the points that I think several
11 of the defendants made in connection with the Code Rebel is
12 that it is utterly unclear how this supposed pump and dump
13 worked. Since our papers went in, we've received all of the
14 3500 material, and it still remains utterly unclear, and I
15 think Mr. Tremonte pointed that out in his motions in limine in
16 connection with the motion to exclude aspects of Francisco
17 Martin's testimony. So with more disclosure, the clarity has
18 not gotten any better. I thought that was important
19 information for your Honor to have.

20 THE COURT: All right. Thank you.

21 Let me actually ask the government -- yes?

22 MS. NOTARI: Your Honor, I have the same issue with
23 regard to the alleged false statements of CNB Bank. It seems
24 that based on the 3500 materials and specifically the
25 statements of the banker Steven Shapiro, that the government

I4ddgalc

1 is -- the financial statement that they are referring to in
2 their initial notice was dated January 2015. That was admitted
3 in regard to a hundred-thousand-dollar line of credit which was
4 granted. Then there was a separate loan in June. And there
5 seems to be another document, financial statement, that we are
6 not sure how they intend to prove this and we have yet to see
7 that produced, and so I think that's also --

8 THE COURT: Do you want to respond to that?

9 MR. QUIGLEY: Yes, your Honor. I'm not sure it goes
10 to the admissibility, but just in the interest of transparency,
11 my understanding is that there is a January 2015 financial
12 statement that Mr. Cooney filled out, and then in June 2015, in
13 connection with getting a promissory note, he was asked to
14 confirm the information on the prior promissory -- the prior
15 financial statement. It is in the promissory note itself. It
16 says that he confirmed the prior financial statement from
17 January --

18 THE COURT: Do you have that promissory note,
19 Ms. Notari?

20 MS. NOTARI: Do I have the --

21 THE COURT: Yes. What are you saying that you don't
22 have that you think --

23 MS. NOTARI: I don't have the financial statement that
24 he supposedly submitted in connection with the June 2015
25 promissory note. So, in other words, what the government is

I4ddgalc

1 just saying is that he confirms the actual one he signed in
2 January, but there is no documentation of that.

3 MS. MERMELSTEIN: I think Ms. Notari is
4 misunderstanding the nature of the documents, all of which she
5 has. I think Mr. Quigley is right that the question is whether
6 or not these facts are admissible, not how the government is
7 going to prove them. But just to be clear -- there is no
8 secret here -- in January of 2015 Mr. Cooney submitted a
9 personal financial statement to City National Bank in
10 connection with a hundred-thousand-dollar loan. That personal
11 financial statement contained false statements concerning the
12 bonds.

13 In May of 2015, he sought a larger loan, a \$1.2
14 million promissory note. Having already had a personal
15 financial statement on file, City National Bank did not require
16 him to resubmit a financial statement. Instead, in the
17 promissory note Mr. Cooney represents, over his signature, that
18 nothing has changed, that all of the information that he
19 previously submitted is correct. So, he reaffirms that
20 incorrect information. And then, as we proffered, when he is
21 unable to pay back the loan and there are inquiries about
22 selling the bonds in order to pay back the loan, he then for
23 the first time says: Oh, that's not really my money. I didn't
24 really buy the bonds when I claimed I own these bonds and
25 didn't tell you I had the loan. That was wrong. In fact, it

I4ddgalc

1 was a loan and I transferred the bonds. So, you are out of
2 luck.

3 That is the sort of overview of the City National
4 evidence, all of which Ms. Notari has.

5 MS. NOTARI: That was the first time I've heard that
6 recitation, so.

7 THE COURT: That's why we're here.

8 MS. NOTARI: Thank you.

9 THE COURT: To Mr. Schwartz's point with respect to
10 Code Rebel, I do have one question for the government. What is
11 the probative value of the pump and dump? I understand the
12 relevance of the proceeds from the fourth bond issuance being
13 used to purchase the shares of the IPO, right, the
14 misappropriation. And I understand that the resulting increase
15 in the price share of Code Rebel stock provided the capital the
16 defendants utilized to make the first interest payment on the
17 bonds sold in the initial issuance. But what I don't
18 understand is why you need to prove up the pump and dump, why
19 that's probative and why it's not substantially more
20 prejudicial. Why can't you just get out those two pieces, that
21 the proceeds were misappropriated and then the money was
22 ultimately utilized to make the first interest payment?

23 MS. MERMELSTEIN: Your Honor, I think the reason that
24 that evidence is admissible as direct evidence of this
25 conspiracy is that part and parcel of the ways in which these

I4ddgalc

1 defendants operated and the ways in which their scheme were
2 designed to enrich them was to take small amounts of money and
3 make it -- sort of grow it at least on paper exponentially.
4 So, for example, by recycling the bonds, the defendants end up
5 with bonds that no one has in fact paid for but that they can
6 use for net capital and other purposes.

7 Similarly, the fraudulent efforts to increase the
8 paper value of Code Rebel shares was a way both to pay various
9 defendants for their roles in this scheme and to continue one
10 more step of inflating the value of the ill-gotten gains;
11 rather than just share a small pot, to increase that pot. So I
12 think that that effort is itself direct evidence of the crime.
13 I think separately, Mr. Martin, who is going to testify about
14 both sort of receiving the shares, buying the shares,
15 transferring the share, etc., is going to himself admit that he
16 understood that the purpose of much of his trading in the stock
17 was not only to liquidate the stock for the use of the scheme
18 but to stabilize the price, a slightly different manipulation
19 than increasing it, so as to avoid the selloffs causing the
20 price to crash, itself also criminal conduct. So, I think it
21 is intertwined inexorably with his testimony, but I think it is
22 direct evidence of the charged crime.

23 THE COURT: All right. I am prepared to rule.

24 I am going to allow in much of the evidence the
25 government seeks to introduce as direct evidence of the

I4ddgalc

1 conspiracy but not all of it. In my view, defendants, in their
2 moving papers, have largely ignored the scope of the conspiracy
3 alleged in the indictment, but I do think that there are two
4 particular things that are just unduly prejudicial. Evidence
5 of an uncharged crime is not considered "other act" evidence if
6 it: "Arose out of the same transaction or series of
7 transactions as the charged offense"; is inextricably
8 intertwined with the evidence regarding the charged offense";
9 or "is necessary to complete the story of the crime." That is
10 from the Gonzalez case, 110 F.3d at 942. This type of evidence
11 need not "directly establish an element of the offense
12 charged," rather, it can "provide background" for the alleged
13 events, and may be admitted to show "the circumstances
14 surrounding the events or to furnish an explanation of the
15 understanding or intent with which certain acts were
16 performed." See the Coonan case, 938 F.2d at 1561. Such
17 evidence may be admitted without regard to 404(b) and its
18 attendant notice requirements and limiting instructions. See
19 Brand, 2005 WL 77055 at *3.

20 However, "where it is not manifestly clear that the
21 evidence in question is intrinsic proof of the charged crime,
22 the proper course is to proceed under 404(b)." Nektalov, 325
23 F.Supp.2d at 372. Rule 404(b) provides that:

24 "Evidence of other crimes, wrongs, or acts is not
25 admissible to prove the character of a person in order to show

I4ddgalc

1 action in conformity therewith. It may, however, be admissible
2 for other purposes, such as paragraph of motive, opportunity,
3 intent, preparation, plan, knowledge, identity, or absence of
4 mistake or accident."

5 The Second Circuit follows an inclusionary approach,
6 allowing the admission of such evidence for any purpose other
7 than to show a defendant's criminal propensity, so long as the
8 evidence is relevant and satisfies the probative-prejudice
9 balancing test of 403. To determine admissibility under
10 404(b), the Court should consider whether the evidence is
11 offered for a proper purpose; the evidence is relevant to a
12 disputed issue; and the probative value of the evidence is
13 substantially outweighed by its prejudice effect. United
14 States v. Curley, 639 F.3d at 56-57. The Court should also
15 consider giving an appropriate limiting instruction. And if
16 there are any limiting instructions you want me to do, please
17 propose them to me in advance.

18 I'll begin with Archer's alleged false statements to
19 Morgan Stanley and Deutsche Bank and the BIT board. These acts
20 are admissible as direct evidence of the charged conspiracy.
21 In October 2014, after purchasing the second tranche of bonds,
22 Archer attempted to deposit approximately \$15 million worth of
23 the bonds into brokerage firm accounts at Morgan Stanley and
24 Deutsche Bank. As part of that process, he sent emails and
25 other documentation to both institutions in which he

I4ddgalc

1 purportedly made false statements indicating that the funds
2 used to purchase the bonds came from real estate transactions
3 involving Rosemont when in fact the money was from the proceeds
4 of the first bond issuance and was provided by Jason Galanis.
5 Archer later transferred \$2.6 million of the bonds he had
6 purchased to Burnham Securities so that it could meet net
7 capital requirements.

8 These acts were very much an integral part of the
9 fraudulent scheme alleged by the government. The information
10 requested by Morgan Stanley to which Archer allegedly gave
11 false statements was required by the bank in order to deposit
12 the bonds. And the deposit of the bonds was critical to
13 furthering the conspiracy alleged, i.e., the misuse of the
14 bonds to further the business endeavors of the conspirators.
15 That Mr. Archer allegedly provided false information, moreover,
16 is probative of his state of mind, which, in light of his
17 anticipated defense at trial, will be an essential element for
18 the jury to resolve. See Carboni, 204 F.3d at 44. Whether
19 Mr. Archer did in fact provide false information to either of
20 these financial institutions in the course of the charged
21 conspiracy will be for the jury to decide. Similarly, the
22 degree of knowledge that Mr. Archer may have had as to the
23 purported improper nature of the information he provided goes
24 to its weight rather than admissibility. The jury will be free
25 to assess how much weight, if any, to provide these purported

I4ddgalc

1 misstatements in assessing Mr. Archer's guilt.

2 Moreover, substantially the same reasoning applies to
3 Archer's purported misrepresentations to the BIT board about
4 the involvement of Jason Galanis in Burnham. Even assuming, as
5 Archer argues, that the Bit board's approval was not necessary
6 to effect the transactions at issue, that doesn't preclude it
7 from being direct evidence of the conspiracy. See Coonan at
8 1561. Because the purported misstatement concerned the very
9 transactions which comprised the alleged conspiracy, they are
10 exceptionally probative as direct evidence of Mr. Archer's
11 intent -- again, a critical issue in light of the defense I
12 expect will be presented at trial. See Carboni at 44. That
13 Mr. Archer would make false statements specifically with
14 respect to Mr. Galanis is further probative of the relationship
15 between the two men during the precise time that they are
16 engaged in the alleged conspiracy. See United States v.
17 Mermelstein, 487 F.Supp.2d at 262. Mr. Archer's argument --
18 essentially that this is a complicated issue -- is insufficient
19 to justify exclusion. The jury's role will be to assess
20 whether the statements were in fact inaccurate and, if so, how
21 critical they were to the overall conspiracy. Mr. Archer also
22 seems to argue that the only misstatements or omissions
23 admissible as direct evidence of a conspiracy are those that
24 are made in conjunction with the sale or purchase of a
25 security. That is simply not the law.

I4ddgalc

1 I'll also note that if somehow these statements were
2 not direct evidence, they would be admissible under 404(b) as
3 to Mr. Archer's intent and knowledge.

4 I similarly find that the purported misstatements and
5 omissions made in the Hughes and Atlantic form ADVs are
6 admissible. A substantial portion of the evidence against
7 Ms. Morton is her failure to disclose conflicts of interest to
8 her clients due in part to the failure to disclose the control
9 of Atlantic and Hughes by certain other co-defendants. This
10 effectively hid from investors that certain individuals
11 controlling the investment advisor also were involved with the
12 placement agent for the bonds and the annuity provider. I
13 simply fail to see how this is not directed evidence of the
14 conspiracy. It is probative of Ms. Morton's knowledge, intent,
15 and consciousness of guilt in failing to disclose that she had
16 ceded control of Hughes and Atlantic, in violation of her
17 fiduciary duties as an investment advisor. This failure also
18 permitted the fraudulent scheme to continue operating
19 unbeknownst to Ms. Morton's clients. Mr. Archer claims that
20 these statements are in fact not true but that explaining so to
21 the jury will be difficult and will create a "toxic"
22 environment due to "the racial dynamics that hang over this
23 case." That, however, is not a sufficient basis upon which to
24 exclude evidence.

25 Next, I'll address the evidence pertaining to

I4ddgalc

1 Mr. Cooney's involvement in a transaction concerning Jason
2 Galanis' residence in Bel Air. On November 12, 2014, Hugh
3 Dunkerley transferred \$3,895,000 of the bond proceeds -- which,
4 again, were supposed to be invested in annuities on behalf of
5 the tribe -- to Cooney, who then used them to "purchase" the
6 home in which Jason Galanis was living in Bel Air. This, too,
7 is direct evidence of the crimes charged. It shows, in the
8 first instance, yet another way in which the bond proceeds were
9 misappropriated by the conspirators for personal use.
10 Moreover, it is exceptionally probative of the relationship
11 enjoyed by Cooney and Jason Galanis during period in which the
12 conspiracy was alleged to have taken place. See, for instance,
13 the Pascarella case, 84 F.3d at 72, and Rosa, 11 F.3d at
14 333-334. I agree with the government that the various
15 arguments made by Mr. Cooney, if they have merit, go to the
16 evidence's weight rather than admissibility. If, for example,
17 Mr. Cooney was simply following the advise of lawyers and real
18 estate professionals, he is free to make that evident to the
19 jury.

20 The same reasoning applies to the efforts to issue
21 additional tribal bonds. The government here has alleged a
22 broad conspiracy. One element of which was the
23 misappropriation of the bond proceeds. The government alleges
24 that the conspirators engaged in the effort to issue bonds from
25 another Native American tribe so that they could use the

I4ddgalc

1 proceeds to buy back bonds from pension fund investors who were
2 not pleased that the bonds had been placed into their accounts.
3 I fail to see how this is not direct evidence of the charged
4 conspiracy, and defendants do not seem to even seriously
5 dispute this point.

6 As to the Code Rebel IPO, as I suggested earlier, I am
7 going to grant in part and deny in part the government's
8 motion. Proceeds from the fourth bond issuance were used to
9 purchase shares of the IPO -- again, part of the conspiracy,
10 which included the misappropriation of proceeds that were
11 supposed to be invested in an annuity on behalf of the Native
12 American tribe. Moreover, the resulting increase in the price
13 per share of Code Rebel stock provided capital the defendants
14 utilized to make the first interest payment on the bonds sold
15 in the initial issuance, again contributing to the ability of
16 the defendants to carry out the conspiracy. Thus, I am going
17 to allow in evidence of those facts. I am not, however, going
18 to permit the introduction of evidence related to the
19 pump-and-dump scheme. The alleged pump-and-dump scheme is
20 itself not probative, in my view, of the conspiracy charged in
21 this indictment, and, in any event, is too prejudicial to pass
22 muster under 403. Moreover, the presentation of evidence can
23 confuse or mislead the jury, as well as result in a minitrial
24 regarding the merits of the government's claim that the
25 defendants engaged in such a scheme. I will just warn the

I4ddgalc

1 defendants that you should be cautious not to open the door on
2 this issue relating to the alleged pump and dump.

3 As for the SEC bars, isn't it true that they relate
4 only to Jason Galanis and John Muran, neither of whom will be a
5 defendant at this trial, correct?

6 MR. QUIGLEY: That is correct, your Honor.

7 THE COURT: So, in the vast majority of instances,
8 prior bad acts of people who are not defendants would perhaps
9 be irrelevant, but here, as the government has detailed, at
10 least with respect to Jason Galanis, that he was barred from
11 the SEC is highly probative of Mr. Archer's intent in light of
12 the representations he made to the BIT board in response to its
13 queries regarding the involvement of Jason Galanis in Burnham.
14 So, I am going to how this evidence in.

15 MR. SCHWARTZ: I just want to be clear on one thing.
16 Mr. Galanis was not operating under that bar at the time of the
17 alleged misstatements. There was no evasion of the bar. It
18 was simply a historical fact. And as the government has said,
19 the only reason they want to introduce it is for context and to
20 say that essentially Mr. Archer should have known better than
21 to do business with someone with that in their past.

22 THE COURT: Do you want to respond to that?

23 MR. QUIGLEY: Your Honor, I think it is relevant -- as
24 your Honor has already ruled, it is relevant to provide context
25 as to why the BIT board was questioning Mr. Archer about his

I4ddgalc

1 association with Mr. Galanis, which frankly inextricably linked
2 to the BIT board's testimony and provides context for why they
3 over a period of months very specifically asked them repeatedly
4 about Jason Galanis and made the lack of association -- Jason
5 Galanis' lack of association with Burnham a condition of their
6 approval of the transaction.

7 THE COURT: All right. I do think it's relevant. And
8 I do think it's probative of his intent, and I am going to
9 allow that in.

10 With the exception I noted earlier of the
11 pump-and-dump scheme related to the Code Rebel IPO, I also
12 don't find that any of this evidence is prohibited under Rule
13 403. As I detailed, each piece of evidence is of significant
14 probative value given the allegations, and I fail to see how
15 any of the proposed evidence creates a risk of unfair
16 prejudice -- or of any of the other countervailing
17 considerations in 403 -- that substantially outweigh the
18 significant probative value.

19 I am concerned, however, with respect to Cooney's
20 purported misstatements to CNB. I mean, I'm not inclined to
21 allow this evidence in. I fail to see how it is direct
22 evidence, because it doesn't seem to have in any way assisted
23 the conspiracy or otherwise be probative of Mr. Cooney's
24 involvement. I am not sure, for the same reasons under 404(b),
25 why it is relevant to his motive, intent, or knowledge with

I4ddgalc

1 respect to these allegations.

2 MR. QUIGLEY: Your Honor, I think it is probative of
3 inconsistencies. He first says owns the bonds. Then he says
4 he doesn't. His inconsistencies in that and his false
5 statements, frankly, are probative of his consciousness of
6 guilt. This is not evidence that would take a lot of detail to
7 introduce. We are talking about, as we mentioned before,
8 essentially two forms and limited interactions with the people
9 with City National. Again, it's highly probative because it
10 goes to his state of mind with respect to the bonds.

11 THE COURT: All right. Ms. Notari, do you want to be
12 heard on this?

13 MS. NOTARI: Your Honor, I would just reiterate that
14 they are completely mischaracterizing this evidence, and CNB
15 and Fulton management were involved in every aspect of this
16 transaction. And Mr. Cooney did not misrepresent anything in
17 his financial statement. And the reason for that financial
18 statement was in regard to a hundred-thousand line of credit,
19 right, which he was granted. At that point the banks, they
20 were not relying upon the bonds. The only reason why things
21 changed and why the bank eventually granted him this
22 \$1.2 million loan was because his Code Rebel stock increased in
23 value. And there are emails to show that CNB clearly relied on
24 the fact that there was an increase -- there was no
25 misrepresentations. They were handling all of his business

I4ddgalc

1 transactions. In fact, CNB Bank, Steve Shapiro, ultimately was
2 involved in transferring the bonds before he ever even obtained
3 the \$1.2 million loan. CNB Bank signed the medallion so that
4 he could transfer the bonds to Burnham and Bonwick. So the
5 fact that -- all of this is going to be a minitrial and a trial
6 that has nothing to do with the case and it's just being used
7 to show propensity evidence, it is prejudicial, and we are
8 going to have to bring in all of these different witnesses and
9 it's going to be a separate trial.

10 MR. QUIGLEY: Your Honor, it's not going to be a
11 minitrial. There is email evidence in which he repeatedly --
12 in which he states to City National, he talks about the bonds,
13 how the bonds are doing well, how the bonds show his assets to
14 get this loan and this promissory note. It's highly relevant.
15 It's proof that he bought the bonds, that he possessed the
16 bonds, and that he lied about the bonds. And this is not --
17 again, this is several documents. There will probably be a
18 witness from City National here who they can cross-examine and
19 ask all of these questions. It is not very complicated
20 evidence by any stretch.

21 THE COURT: I will reserve judgment on this. I'll
22 take a closer look at the underlying facts and I will write an
23 order.

24 MS. NOTARI: Your Honor, it is not going to be just
25 City National Bank, it is going be every person -- it is going

I4ddgalc

1 to be the Fulton management people are going to have to
2 testify. They were all part of all of these different
3 transactions. They were part of -- from this entire period of
4 time, they basically -- Steve Shapiro admits that he had no
5 personal dealings with Mr. Cooney until much later in the
6 timeline. And it's very hard for really the Court to
7 understand like all of the intricacies with the emails, but
8 it's not just one witness, it is at least three witnesses that
9 we're going to have to deal with.

10 MS. MERMELSTEIN: Just to clarify, your Honor, that's
11 not the case. I actually think the government can do it in one
12 witness from Fulton Management, who is the intermediary between
13 Mr. -- he is Mr. Cooney's agent for this purpose. He is the
14 intermediary between Mr. Cooney and the bank.

15 And I think that there is just no question that a very
16 important fact, a very essential question here is was Mr.
17 Cooney's purchase of these bonds legitimate? Right? Was he
18 really buying them because he felt they were a good investment?
19 And was he doing so with his own money, or was he doing so with
20 money from Mr. Galanis? So there is just no question that both
21 of his statements with respect to his efforts to obtain this
22 loan, the initial statement in which he falsely claims that he
23 owns them in full, as Mr. Quigley points out, there are emails
24 where Mr. Cooney writes to Fulton Management and says, look,
25 the bonds are showing a value, this should help me get the

I4ddgalc

1 loan. And there is no question that he is affirmatively
2 representing that they belong to him, and that in failing to
3 disclose the reliability of the purported loan from Jason
4 Galanis, he's claiming these are fully mine. He then later
5 admits that that's not true, and then he claims that this was a
6 loan from Jason Galanis and that he in fact has to pay the loan
7 back for the first time and that he, as a result, in fact does
8 not own the bonds. And, in fact, he then submits a corrected
9 personal financial statement admitting that he has that
10 liability.

11 Those two statements are essential evidence of
12 Mr. Cooney's intent with respect to the bonds and his
13 understanding about whether or not this was a legitimate
14 transaction or a fraudulent transaction. And the changing
15 story about it's my money, it's Jason Galanis' money, it is a
16 loan that has to be paid back I think is essential evidence of
17 his intent with respect to these bonds. I think it is a
18 30-minute witness and, you know, a handful of documents. It is
19 just not that complicated.

20 THE COURT: All right. I will reserve ruling on this.

21 Finally, I am not going to permit the government to
22 introduce evidence relating to the arrests and convictions of
23 Mr. Hirst and John and Jason Galanis in Gerova. I just fail to
24 see how it is direct evidence of this conspiracy. Indeed, in
25 the context of discussing discovery, the government repeatedly

I4ddgalc

1 represented to me that the Gerova matter was wholly unrelated
2 and irrelevant to the current case. In any event, I think the
3 unfair prejudice substantially outweighs its probative value.
4 I just can't conclude that such evidence passes the 403
5 balancing test in light of the substantial prejudice that would
6 result from jurors in one criminal prosecution hearing that a
7 jury in a previous matter had convicted two of the defendants
8 for engaging in a scheme to defraud.

9 I will say, if the government thinks that there are
10 certain arguments that the defendants make will open the door
11 to this, I want to have that discussion in advance. I want to
12 sort of tee that up. I'm not suggesting you can't get in the
13 fact that these individuals knew each other before -- I mean,
14 obviously the Galanises did -- but I just think it's too
15 prejudicial.

16 MR. QUIGLEY: Your Honor, we would ask your Honor to
17 reconsider. I mean, they put in -- Mr. Galanis in particular
18 put in a surreply that we didn't get a chance to respond to. I
19 think what you just said really illustrates the probative value
20 of this evidence. You said it is obvious that the Galanises
21 know each other. Yeah, it is obvious. But it is not
22 obvious -- the nature of the relationship is not obvious. Just
23 because they are father and son, there are a lot of -- you
24 know, there are millions of father-and-son relationships
25 throughout the United States.

I4ddgalc

1 THE COURT: I think it is too prejudicial. They were
2 convicted before another jury in another case.

3 MR. QUIGLEY: Judge, courts routinely introduce
4 evidence of prior -- in the Gracesqi case, we cited I think
5 Judge Castel's decision that was affirmed by the Second Circuit
6 two weeks ago after our reply brief. I mean, that was evidence
7 that there was a robbery and kidnapping, that the defendant and
8 a -- somebody was a cooperator -- eventually a cooperator but a
9 co-conspirator were involved in. It shows the nature of their
10 relationship. I think, frankly, it is more probative because
11 they were father and son, because they had a preexisting
12 relationship. If it were just two random guys who teamed up in
13 a securities fraud conspiracy, maybe; but because they were
14 father and son, it's probative -- it's highly probative, the
15 nature of their relationship. And the defendants -- and this
16 goes for Mr. Hirst also -- their whole argument is that they
17 relied on and trusted Mr. Galanis. And the idea --

18 THE COURT: That's why I'm teeing up the issue.
19 That's why I'm saying if there are arguments that you think the
20 defendants will make with respect to their previous
21 relationships, you know, specifically to Jason Galanis, we can
22 talk about it beforehand so we can set some guidelines on what
23 could potentially open the door to this testimony. Right now I
24 think it is too prejudicial. You are welcome to submit a
25 letter if you didn't have a chance to respond before and I'll

I4ddgalc

1 read it, but that is my ruling.

2 MR. QUIGLEY: They have made those arguments, your
3 Honor. They've all said that we relied on Jason Galanis. We
4 had Mr. Touger, I'm paraphrasing, but he said they had an
5 ordinary father and son relationship --

6 THE COURT: He doesn't say that they relayed on Jason
7 Galanis.

8 Sorry. Go on.

9 MR. QUIGLEY: I think that's clearly where this case
10 is going. That was the whole point of part of the severance
11 motion is because everybody is going to point the finger at
12 Jason Galanis and the other defendants. So, certainly for
13 Mr. Galanis and Mr. Hirst, the relationship -- the type of
14 relationship that they had with Mr. Galanis, with Jason
15 Galanis, is highly probative of the type of relationship that
16 they had and the fact that they couldn't trust him and they
17 shouldn't trust him. And they knew when he said to them, oh,
18 here's, you know --

19 THE COURT: Then maybe there is some other evidence
20 that can come in -- and, frankly, there is going to be a lot of
21 it, I imagine, that is going to come in anyway about Jason
22 Galanis and his conduct in the past, and so maybe there is
23 evidence that could come in about their knowledge of his
24 misconduct in the past that's not so prejudicial as to tell
25 this jury that John Galanis and Mr. Hirst were previously

I4ddgalc

1 convicted --

2 MR. QUIGLEY: Right, but --

3 THE COURT: -- of fraud.

4 MR. QUIGLEY: -- I'm sure there will be plenty of
5 evidence of Jason Galanis's misconduct, but he is not on trial
6 here.

7 THE COURT: No. I understand that. What I'm saying
8 is maybe there is evidence that you can get in, again,
9 without -- and I'm sure that there is -- of defendants'
10 knowledge of Jason Galanis's criminal past without getting in
11 the fact that these two defendants were previously convicted of
12 fraud.

13 MR. QUIGLEY: Right. But that doesn't go to the
14 relationship -- Jason Galanis could have been convicted or done
15 all kinds of things, but the issue and the reason it is
16 relevant is because Mr. Hirst and John Galanis knew about that.
17 So you could introduce --

18 THE COURT: So maybe there is a way to get in the fact
19 that they knew about it without getting in the fact that they
20 were convicted of fraud themselves. I just think it is too
21 prejudicial.

22 MR. QUIGLEY: There is not, your Honor.

23 THE COURT: Then, too bad.

24 MR. SCHWARTZ: Your Honor, before we move off the
25 404(b), I have just one question.

I4ddgalc

1 THE COURT: Yes.

2 MR. SCHWARTZ: It is not on this issue. If you are
3 still on this issue, go ahead.

4 MR. QUIGLEY: Your Honor --

5 THE COURT: As I said, you indicated you wanted to
6 submit a letter because you didn't have a chance to respond to
7 the reply. You can.

8 As I see it, I don't know why there can't be a way to
9 elicit evidence that the defendants were aware of Jason
10 Galanis's history and in addition to preexisting connections
11 between them without getting in the fact that they were
12 convicted by another jury of fraud with him, which, as I said,
13 I think is too prejudicial. So, think about that.

14 MR. QUIGLEY: We will submit a letter, your Honor.

15 THE COURT: Yes. Mr. Schwartz.

16 MR. SCHWARTZ: I have a question. I am going back to
17 the forms ADV.

18 I understood your Honor's ruling about the relevance
19 of that evidence is direct evidence of the charged scheme with
20 respect to Ms. Morton, and apparently the argument is that she
21 was somehow involved in these false statements in the ADV. One
22 of the arguments that we made, which your Honor didn't address
23 and which is important, is that I think it is undisputed that
24 Mr. Archer and Mr. Cooney didn't have any knowledge of the form
25 ADV, let alone the false statements in the form ADV, but the

I4ddgalc

1 false statements are supposedly about them. Supposedly, they
2 ought to have been disclosed, amongst others, in the ADV.

3 I want to be clear, in addition to one of many reasons
4 why Ms. Morton should be severed from Mr. Archer and
5 Mr. Cooney, that with respect to them it is not evidence of the
6 charged scheme and your Honor will entertain a limiting
7 instruction.

8 THE COURT: I will entertain a limiting instruction.
9 So, feel free to, as I said earlier, just submit that to me in
10 advance so we can talk about it.

11 MR. SCHWARTZ: Thank you, your Honor.

12 THE COURT: All right. Thank you.

13 So, now let's turn to the motions for severance. I
14 think I heard argument on this the last time. If anyone wants
15 to be heard further, I am happy to hear you out.

16 So I have -- yes, go ahead.

17 MR. SCHWARTZ: I'm sorry. I think this is very
18 intertwined with some of the motions in limine, which I assume
19 your Honor hasn't gotten through yet --

20 THE COURT: Right.

21 MR. SCHWARTZ: -- as the responses aren't due yet.
22 Because a number of the government's exhibits and part of
23 Ms. Morton's defense have to do with her whistleblowing, her
24 attempts to cooperate. And so the government has asked for
25 that to be excluded, but at the same time they intend to

I4ddgalc

1 introduce a number of exhibits in which Ms. Morton makes
2 representations to the clients of the investment advisors that
3 she was duped by the people who now are her codefendants. To
4 me, that is part and parcel and if the cooperation comes out,
5 the exhibits the government wants to put in should come out as
6 well. But your Honor should be aware of that evidence in
7 connection with the severance.

8 THE COURT: Do you want me to wait to rule on
9 severance until I review that material?

10 MR. SCHWARTZ: Or at least you ought to look at the
11 evidence the government wants to put in, because one of the
12 critical severance factors is whether there is going to be
13 evidence that's admissible as to one defendant but not others.
14 So in a trial that's just Ms. Morton, it may be OK to get into
15 all of this stuff and to show these what the government is
16 going to say are false exculpatory statements blaming her
17 codefendants, but it's not proper as to the codefendants.
18 These are not co-conspiratorial statements. They're setting up
19 a trial defense, if in fact they are false, or they are
20 evidence that she's innocent if they are accurate. But either
21 way, they are not -- they are hearsay as to my clients. We'll
22 have no opportunity to confront Ms. Morton, and it is wholly
23 prejudicial. So, your Honor needs to consider that and be
24 aware of that evidence in connection with the severance motion?

25 THE COURT: I haven't looked at the statements in

I4ddgalc

1 evidence.

2 Yes.

3 MR. QUIGLEY: Your Honor, let me cut to the chase on
4 this ruling. To the extent there are -- and I think we know
5 because we just got the motions in limine filed the other
6 night, I think I am aware of the statements that Mr. Schwartz
7 is talking about, the particular statements. We can either
8 redact those statements or not offer them from where she claims
9 the other defendants had said --

10 MR. TOUGER: Your Honor, I would object to the
11 redaction because my client is not mentioned by her at all as
12 having any involvement in this case, and it's obviously
13 prejudicial to him. Possibly, the jury might think he's part
14 of the defendants that she is talking about, when he isn't. It
15 would be highly prejudicial for Ms. Morton to say, oh, these
16 other people are involved in which she hasn't mentioned my
17 client and, therefore, they might think that she did, and I
18 think that's highly prejudicial. It certainly goes to his
19 ability, if those statements did come in, to say to the jury,
20 look, you see, we weren't involved at all.

21 MS. SIKES: And Ms. Morton would also be objecting to
22 any redaction of that, as it would go to her state of mind at
23 the time, essentially because the government is alleging that
24 the conspiracy lasts all through 2016.

25 MR. QUIGLEY: As to Mr. Touger's point, if it was

I4ddgalc

1 redacted, the jury is not going to have any idea what it says.
2 It could say any one of a million things. I don't think that
3 really prejudices John Galanis.

4 THE COURT: I haven't read the motions in limine yet.
5 I am happy to defer judgment on this issue until then. I think
6 everyone should assume that it is going to be one joint trial
7 for now just for purposes of trial preparation, but I am happy
8 to read the submissions and look at the evidence before I rule
9 formally.

10 Mr. Biale.

11 MR. BIALE: I am going to ask Mr. Quigley to speak a
12 little louder because we are having a hard time understanding
13 him.

14 THE COURT: OK. Is there anything in particular you
15 did not hear?

16 MR. BIALE: No. I think I've got it.

17 THE COURT: OK.

18 MR. TOUGER: I think I misheard, which is why --
19 Mr. Schwartz just told me his argument is they are going to
20 redact everything and not just the names.

21 THE COURT: Right.

22 MR. QUIGLEY: That is what we offered, yes, your
23 Honor.

24 THE COURT: Yes.

25 MR. TOUGER: Then my argument obviously --

I4ddgalc

1 THE COURT: OK. But Ms. Morton, as I understand it,
2 still wants it in because she wants to -- I mean, you phrased
3 it in terms of state of mind, but she wants to show the efforts
4 she made to assist.

5 MS. SIKES: Yes, your Honor.

6 THE COURT: OK. Why don't we talk now about the
7 various motions for an adjournment. I think I have 16 defense
8 letters for an adjournment at this point. I don't think as a
9 matter of law any of the defendants have demonstrated an
10 adjournment is warranted. A district court has a great deal of
11 latitude in scheduling trials. As a result, trial judges enjoy
12 very broad discretion in granting or denying trial
13 continuances.

14 I will begin by addressing the primary themes
15 emanating from the defendants' motions for adjournment -- the
16 volume and timing of the discovery production in this matter.

17 I don't believe this factor warrants an adjournment.
18 As Mr. Cooney rightly notes in his March 19th letter, prior to
19 the disclosure of the Gerova materials and consensually
20 recorded calls, the government had produced 5.1 million pages
21 of discovery, and I recognize how much that is. This number
22 doesn't include the 734,166 documents comprising the Gerova
23 discovery, nor the 12,000 audio files comprising Jason Galanis'
24 recorded calls. It's also noted that from January 16th to
25 March 19th of this year, the government produced an additional

I4ddgalc

1 32,500 pages of material, demonstrating the continued nature of
2 discovery production.

3 So, I am sympathetic to the amount of materials. It's
4 why I granted a very long adjournment previously, over the
5 government's strenuous objection. I don't think that's an
6 adequate basis for a lengthy adjournment here, which has been
7 what's requested.

8 First, I want to make something clear on the record.
9 As you are aware, I urged the government to disclose the
10 discovery in the Gerova matter, which I understand was made
11 available to all the defendants by Mr. Biale, who was in
12 possession of the materials from representing Mr. Hirst in that
13 Gerova case before Judge Castel. The government also produced
14 recordings of consensually recorded calls involving Jason
15 Galanis.

16 If I wasn't already clear on this, I want to make
17 clear for the record that although Mr. Hirst and Jason and John
18 Galanis were defendants in Gerova and some of the defendants
19 here were on recorded calls when Jason Galanis was cooperating
20 with the FBI on an unrelated investigation four years ago,
21 prior to any of this conduct in this case, I remain unconvinced
22 that the defendants were legally entitled to those matters, to
23 those materials, given that the two matters are otherwise
24 wholly unrelated to the present case. But, nonetheless, I
25 thought, in an exercise of caution, it should be disclosed.

I4ddgalc

1 This conclusion, though, is buttressed by my ruling
2 today prohibiting the government from introducing the fact of
3 the arrests and convictions in Gerova. I mean, my previous
4 urging to the government, or direction, was out of an abundance
5 of caution and considerations of fairness, particularly in
6 light of the fact that Mr. Hirst and perhaps John Galanis as
7 well, had some or all of the materials from the Gerova case and
8 I thought it was appropriate to make it even and have everyone
9 have the same materials. And while it is true that some of the
10 materials contained in that discovery may be Giglio as to Jason
11 Galanis, there is already a veritable mountain of such
12 evidence, and at a certain point in the trial that is going to
13 become cumulative anyway.

14 Moreover, the transcript of the Gerova trial, which
15 was held in September 2016, is and has been publicly available
16 on this court's docket. So as a result, I just want to make
17 clear that the volume of the new material, at least the Gerova
18 material, that was recently received by defendants doesn't
19 substantially weigh in favor of an adjournment. Although, the
20 government continues to make new productions, they're
21 comparatively smaller than the previous discovery productions
22 and don't require an adjournment, particularly in a case of
23 this nature.

24 Mr. Archer contends, in addition, that a continuance
25 is appropriate in light of the publication of a book detailing

I4ddgalc

1 his involvement in the hedge fund industry with the children of
2 John Kerry and Joe Biden, including one entity that will be
3 referenced at the trial in this matter. This is an
4 insufficient basis upon which to require a continuance. Archer
5 is correct that a continuance can be necessitated by pretrial
6 publicity, but such a continuance is only required when the
7 publicity amounts to a wave of public passion, creating a
8 presumption of prejudice. That is a quote from the Romero
9 case, 897 F.2d at 53. Here, Archer has failed to make such a
10 showing. He has cited to several news articles, but they fall
11 well short of arising to a wave of public passion. And I'll be
12 sure to question all the jurors during voir dire about their
13 familiarity both with Archer and with the book and any
14 additional questions you think appropriate.

15 With respect to Ms. Morton, we'll talk privately
16 regarding her health issues.

17 The Second Circuit has long held that granting or
18 denying a motion for a continuance or a severance on the ground
19 that an accused is physically incompetent to stand trial falls
20 within the sound discretion of the trial court. And as I said,
21 we'll talk about that because that really relates to
22 Ms. Morton.

23 But, finally, I want to address the motions submitted
24 by John Galanis and Mr. Hirst, which are similarly denied.

25 Remind me, the day that you had asked for Mr. Galanis

I4ddgalc

1 to be here was April 1st, is that right?

2 MR. TOUGER: Your Honor, let's get the history exactly
3 correct. In February, Mr. Galanis was given tests by BOP --

4 THE COURT: I don't mean to sound unsympathetic or
5 to -- I didn't mean to sort of accuse you of misconduct in
6 bringing him here late. But in any event, go on. Go on.

7 MR. TOUGER: I hope it is not misconduct.

8 THE COURT: No. But at the start of this, you know,
9 when I said like, look, it was your choice to do this, I just
10 want to be clear that I am sympathetic to his health concerns
11 and I understand why you did what you did. I just want to note
12 that. But go on.

13 MR. TOUGER: You are right, your Honor, there is no
14 legal -- there is no case that says when somebody has been
15 diagnosed with possibly prostate cancer the trial must be
16 adjourned. So you are right, there is no law on this. But
17 this is a matter of humanity. This is a man who has now waited
18 two-and-a-half months for a test that anybody in this courtroom
19 would have taken within 48 hours.

20 THE COURT: OK.

21 MR. TOUGER: To not --

22 THE COURT: Why hasn't that happened? Is this
23 something that the government was asked to assist with with the
24 BOP, because it has been months?

25 MR. TOUGER: You ordered them to do it.

I4ddgalc

1 THE COURT: Yes.

2 MR. TOUGER: I mean, so I don't know why they didn't.

3 I can't answer that for the BOP. Maybe a BOP representative
4 can tell you. But Mr. Galanis has been sitting there in the
5 Los Angeles prison, in their custody, for two-and-a-half
6 months, and he hasn't said, no, don't give me the test, he has
7 been asking for the test. So for two-and-a-half months he has
8 been sitting there. And now you want to start a trial that's
9 going to last another two months. He can't get the tests
10 during the trial. So, it's going to be another two and a half
11 months until he gets the tests. So five months is going to go
12 by --

13 THE COURT: Let me ask you this. Remind me,
14 Mr. Quigley, when is he supposed to come here?

15 MR. QUIGLEY: Wednesday, your Honor.

16 THE COURT: Wednesday.

17 MR. TOUGER: I'll tell you why I'm not so excited
18 about that date, your Honor. The government has made it very
19 clear in their letters that nobody can be transported in 48
20 hours to New York from Los Angeles. They said that in their
21 letter. Mr. Galanis is still in Los Angeles as we speak. He's
22 not going to be moved during the weekend, he has been told
23 that. So the earliest he's possibly moving, starting to move,
24 is Monday. So that means that they are going to get him here
25 in 48 hours. Yes, that is possible. They could put him on a

I4ddgalc

1 plane and fly him here in 48 hours, in that time period, no
2 doubt about it. But the government said in their letter that
3 that's not possible, it takes at least a week. I'm just going
4 to go with what the government said in their letter to the
5 Court.

6 So if he gets here Wednesday, that's wonderful. But
7 there are two related issues to that. One, he still has to
8 have the tests, and, two, that gives me less than two weeks --
9 less than two weeks -- to talk to my client. And believe me,
10 every issue that Mr. Tremonte has had with Mr. Hirst, I am
11 going to have with Mr. Galanis. The BOP could come in here and
12 the government could come in here -- and they do this all the
13 time, oh, we have access, you have access, you have this, you
14 have that. That's not true. I can tell you, I have been
15 practicing in this federal court for decades. That's not true.
16 Mr. Tremonte's letters show you that is not true. He is not
17 lying to this Court. The BOP says a lot of things. They don't
18 produce them.

19 Yes, there is a computer on the floor that he can use
20 24 hours a day, but there are 30-odd other individuals wanting
21 that computer. Yes, there are computers in every attorney room
22 in the MDC. Anecdotally, half the time -- I mean, all the time
23 half of those are not working. And I am not the only one who
24 is going to want those computers.

25 So I can go to the MDC, spend the hour and 20 minutes

I4ddgalc

1 waiting for my client to come down, which they say doesn't
2 occur. The hour and 20 minutes he comes down and I don't have
3 a computer. I can wait another hour or so for a computer, but
4 I'm not seeing my client with any credibility of an interview
5 because there is paperwork that he hasn't even seen yet.

6 And the Court discounts this 35,000 documents. And
7 the 3500 material, you haven't even mentioned how many
8 documents that is. I don't even know. Do anybody here know
9 how many documents are in the 3500 material?

10 (Counsel conferred)

11 24,000, at least, documents. Mr. Galanis has not seen
12 that yet. The exhibits are 24,000. Who knows how many
13 documents are there. But let's be honest, there are a lot. He
14 hasn't seen any of that yet. And I haven't seen it with him.
15 It is not a use -- it is not complete for me to look at a
16 document and say, oh, here's this email or, oh, Dunkerly says
17 this, or Raines says that, or Haynes says that without
18 consulting with my client, who was there when Haynes says that
19 happened or Raines says that happened. Did it happen, as they
20 say exactly now we have --

21 THE COURT: I'm not minimizing it and --

22 MR. TOUGER: But that's just the first -- let's go
23 back to the first issue.

24 THE COURT: All I was going to say is, look, this is a
25 lengthy trial. You are going to have time to work --

I4ddgalc

1 MR. TOUGER: How, your Honor? You want me to be here
2 eight hours a day. Wait for Mr. Galanis to get back to the
3 MDC. Then go sit with Mr. Galanis. And when am I supposed to
4 prepare for tomorrow's witnesses? When am I supposed to do the
5 motions in limine that are going to be done? When am I
6 supposed to prepare -- read the record from the day before?
7 It's very easy for the Court --

8 THE COURT: I'm not --

9 MR. TOUGER: -- to say it could get done.

10 THE COURT: I'm not minimizing it. Look, I put this
11 trial off, over the government's objection, for what, six
12 months --

13 MR. TOUGER: Your Honor, part of my argument is you
14 have done everything you can.

15 THE COURT: I know. But it is for this reason,
16 because I understand this concern, and I think it is a very
17 legitimate concern and I think the health concerns are
18 legitimate concerns, too. I mean --

19 MR. TOUGER: I want to get back to the health
20 concerns.

21 THE COURT: OK.

22 MR. TREMONTE: Before you do that, can I be heard on
23 this briefly?

24 THE COURT: Yes.

25 MR. TREMONTE: We submitted an update letter of two

I4ddgalc

1 pages this morning, which I'm assuming the Court has not had
2 time to consider. And I want to emphasize just a couple of
3 things briefly because I think they are relevant to the sort of
4 practical considerations here.

5 You know, we've been in frequent contact with the
6 government, and the government has actually been very
7 cooperative and attempting to move the folks over at the MCC to
8 put us in a position where Mr. Hirst can meaningfully review
9 materials and participate in his defense. It is true, I mean,
10 we went to see Mr. Hirst frequently when he was in Jesup. We
11 did our --

12 THE COURT: There he had full access to materials.

13 MR. TREMONTE: He didn't have full access to the
14 materials but he did have full access to us, and we did a very
15 good job, I think, of summarizing for him and educating him
16 about what we were seeing in the Rule 16. So I have no quarrel
17 about that. And as I said, the government has actually been
18 very helpful trying to move the needle at the MCC and I
19 actually think has made some progress.

20 The issue we have is that there is an enormous
21 difference in terms of trial preparation between our diligent
22 efforts to educate Mr. Hirst on the Rule 16 and the sort of
23 more general issues of trial prep and going over the 3500 and
24 the government exhibits. And that's what we haven't been able
25 to do. But the good news is I think -- and it is in our

I4ddgalc

1 letter -- within a week at the outside, assuming that the folks
2 at the MCC are not completely intransigent, right, I think we
3 will actually be in a position where we'll be able to review
4 what we need to review, Mr. Hirst will have access --
5 meaningful access to his materials, which he doesn't currently
6 have. That suggests to me, especially when coupled with the
7 situation with Mr. John Galanis, which I don't know that much
8 about but I understand from today's colloquy the basics, that,
9 you know, a relatively short adjournment will go a long way
10 towards alleviating the practical concern that we have that
11 Mr. Hirst has really not been able to meaningfully prepare. He
12 will be, but the fact of the matter is that conditions at the
13 MCC have just not changed until maybe next --

14 THE COURT: I'll tell you this: I had planned, coming
15 in here, to adjourn it for two weeks. I wanted to make the
16 record clear on the lengthy adjournment that has been requested
17 and why I didn't think it is appropriate, and I have other
18 reasons based on who had what information at what time. And so
19 I was going to do that anyway and put it off for two weeks.
20 And then the question becomes are there health or other issues
21 that prevent us from even doing it then, which I think is
22 May 14th.

23 MR. TOUGER: Your Honor, I'm just trying to play this
24 out, so to speak. And the Court has been wonderful in
25 everything I've asked the Court to do --

I4ddgalc

1 THE COURT: It is not about me.

2 MR. TOUGER: The issue here is, your Honor, that we
3 have a man sitting there -- and everybody knows with cancer,
4 early detection is the key. Prostate cancer is curable if
5 caught early enough. OK?

6 THE COURT: But you don't know that he has it.

7 MR. TOUGER: That's why I'm saying, early detection is
8 the key.

9 THE COURT: To put off a trial --

10 MR. TOUGER: I'm not asking you to put off the trial.
11 I'm asking you to allow him the time to get here, because he is
12 obviously not having the test -- that surgery done in Los
13 Angeles, that is obviously not happening. So all I'm asking
14 your Honor is for him to get here. If he gets here on
15 Wednesday, that's wonderful.

16 THE COURT: And if I put off the trial for two
17 weeks --

18 MR. TOUGER: No. Let's play that out. If he gets
19 here on Wednesday and then the surgery is done, let's say,
20 within 48 hours of that, I have a friend who just had the same
21 procedure done, and he's 64 years old, and he needed two weeks,
22 at least, of recovery. He is still not fully recovered, but
23 two weeks he was again, you know, able to move uncomfortably.

24 And then I still have these days that I have to go see
25 Mr. Galanis and talk to Mr. Galanis and meet with Mr. Galanis

I4ddgalc

1 and go over this paperwork. You are asking me to do a
2 Herculean task. And my name is David Touger, it is not
3 Hercules. OK?

4 THE COURT: OK.

5 MR. TOUGER: So, two weeks is nice but it is not
6 effective. I'd rather start April 30th. But May, June 1st --

7 THE COURT: Would you rather start April 30th?

8 MS. NOTARI: No.

9 MR. TOUGER: June 1st I think would be fair, your
10 Honor. Why don't you tell the government they can't meet with
11 their witness for two weeks? They'd never agree to that. But
12 you're asking me -- I've given up two weeks of my time --

13 THE COURT: Look, again, I understand it was for
14 health reasons, but you made a decision to wait until he is
15 brought here --

16 MR. TOUGER: No. No. I made a decision to wait until
17 April 1st, your Honor. You keep saying that.

18 THE COURT: I know. But if I adjourn it for two
19 weeks, it will get you those two weeks back.

20 MR. TOUGER: But the tests haven't been done yet. If
21 he would have come here April 1st, fully done, fully
22 recuperated, fully ready to go. Instead, what's happened, your
23 Honor, and what the Court is also discounting -- and this is a
24 much less vital reason, but the last time they tried to move
25 him for these tests, they did so without a wheelchair-

I4ddgalc

1 accessible vehicle, so they tried to pick him up and put him in
2 the van. Of course they dropped him. So, of course, they've
3 ordered an MRI because all the benefits of his surgical -- of
4 his spinal fusion has been wiped out. So now he is sitting
5 there with a numb right arm and dizziness because they dropped
6 him. Because they didn't listen to him when he said, no, don't
7 pick me up and put me in this van. So that test also hasn't
8 been done yet. So the two weeks is nice but it doesn't field
9 equally, your Honor, because he is not coming here fully tested
10 with his mind solely prepared for trial.

11 And let me ask you this question, your Honor. If he
12 has the tests and they prove positive for cancer --

13 THE COURT: We're not get into that.

14 MR. TOUGER: I know, but that is why it is important
15 to start the trial after he has the tests, because if you start
16 the trial and we go through all of that and he comes back and
17 he has the tests, you are going to tell him you can't have the
18 surgery for your prostate cancer? I don't think the Court
19 wants that on its shoulders, to wait to do surgery on cancer
20 for two-and-a-half months. Because that's humanitarian.
21 That's cruel and unusual punishment, to sit here and let your
22 cancer grow in your body for two and a half months while you
23 sit on trial.

24 THE COURT: Again, we haven't gotten there. He does
25 not have a diagnosis.

I4ddgalc

1 MR. TOUGER: Right. So what I'm asking the Court,
2 your Honor, is that as soon as he gets here, BOP do the surgery
3 and we adjourn the trial for a month after the surgery.

4 THE COURT: I don't know if BOP will do the surgery
5 right away.

6 Does the government want to speak to this?

7 MS. MERMELSTEIN: Yes, your Honor. Thank you.

8 First of all, let me note that sort of barring some
9 freak storm or some other problem, Mr. Galanis will be here on
10 Wednesday. The marshals, since this defendant is not available
11 as a general principle, at great expense are flying New York
12 marshals to California to get Mr. Galanis and bring him here.
13 So, it is true that he hasn't been picked up yet. He will be
14 picked up on Tuesday and he will be here on Wednesday. That is
15 the representation that has been made to the government by the
16 marshals.

17 No one has asked the U.S. Attorney's office to
18 participate or have discussions with FCI Terminal Island or BOP
19 about Mr. Galanis' health situation so I don't have any
20 information about that situation. What I can say is simply
21 from having dealt with medical issues for incarcerated
22 defendants for a long time now is that I'm sympathetic to
23 Mr. Galanis' situation. It is not --

24 THE COURT: Speak into the microphone, please.

25 MS. MERMELSTEIN: I'm sorry. I am sympathetic to

I4ddgalc

1 Mr. Galanis' situation, but it is not at all clear from what we
2 know at this point in time that BOP will be able to accommodate
3 a biopsy sort of immediately upon his arrival. Indeed, given
4 the complicated nature of bringing an inmate to a medical
5 facility, I suspect it can't be done as a matter of, you know,
6 immediate turnaround. And while I'm sympathetic to his
7 discomfort, I also don't think that given the nature of his
8 complaint it is necessarily clear that there is a medical
9 difference between doing a biopsy sort of now versus sort of
10 six weeks from now. I'm not suggesting that he should be told
11 to wait, only that I don't think it is clear that that is an
12 issue.

13 And I think that life experience from medical
14 treatment, including for just people who are seeing regular
15 doctors and are not incarcerated, is that it is frequently the
16 case that following a biopsy surgery takes a long time to
17 schedule just in the ordinary course of treatment, in the event
18 that he needed such a thing, which it is not clear that he
19 does. And I think that the recovery from this type of biopsy,
20 when you say full recovery, it appears that that means no
21 strenuous exercise, for example, not an inability to function
22 and participate in preparing for a trial.

23 So I think your Honor is right that there is no sort
24 of basis for an adjournment on that basis and that this can all
25 be accomplished. Look, the government thinks we should go

I4ddgalc

1 forward on April 30th. There are some reasons why an
2 adjournment would be very difficult on a trial front for the
3 government, but if your Honor adjourns it for two weeks, we
4 will try it two weeks later.

5 THE COURT: How long do you think the trial -- what is
6 your best estimate now, given my 404(b) rulings? I know it is
7 hard to predict, and I am going to ask the defendants the same
8 thing, but I feel like I've heard everywhere from three weeks
9 to three months.

10 MS. MERMELSTEIN: I struggle to predict, which is why
11 I hesitate to commit to something. I think in part the problem
12 is that with so many defendants, it is unclear to the
13 government what the length of cross-examinations will be for
14 its witnesses. So if it is exponentially longer than the
15 directs in every case, then that is a very different ballgame
16 than if it is not. I would guess that with respect to many of
17 these witnesses there would only be cross-examination by one
18 defense counsel, because many witnesses pertain to different
19 pieces but I don't know how to speak to that.

20 I think -- oh, that's a very good point by
21 Mr. Quigley. The other issue is that there are an enormous
22 number of document custodians that are necessary in this case,
23 dozens and dozens of them. Because of that, the government
24 provided proposed stipulations to the defendants, and we
25 provided the bulk of them three weeks ago now and a number of

I4ddgalc

1 additional ones this week and we've heard back, despite
2 repeated entreaties that they respond to us, nothing, no
3 indication one way or the other, no response one way or the
4 other.

5 THE COURT: Let me ask them right now.

6 MR. TOUGER: Your Honor.

7 THE COURT: Yes.

8 MR. TOUGER: As far as stipulations, I can't talk to
9 my client about them so I haven't responded to them.

10 I love it that Ms. Mermelstein just casts off this
11 idea. His prostate specific antigen level is four times the
12 normal level. That's what has caused this. It is not, oh, I'm
13 going to the bathroom a lot and therefore I think -- he has had
14 the preliminary tests. The preliminary tests say he is a good
15 bet to have prostate cancer. He is the age of men who get
16 prostate cancer. Everything points to the fact that he has
17 prostate cancer. Hopefully he doesn't. Nobody is wishing that
18 on him. But it's very easy for this U.S. Attorney to sit here
19 and says, oh, it's not a big deal, he can wait a little bit
20 longer. I can't believe I'm hearing that. This is a human
21 being.

22 THE COURT: All right.

23 MR. TOUGER: So --

24 THE COURT: I understand.

25 MR. TOUGER: My point is, your Honor, that they have

I4ddgalc

1 been meeting with their witnesses for two weeks now these two
2 weeks who knows how many hours a day. I haven't had the
3 ability -- because the government decides that every phone call
4 that they make is listenable, that every email he sends me they
5 can read, so I haven't had an attorney-client, government not
6 listening in except for maybe ten-minute phone calls that he is
7 allowed to get maybe every two weeks I get to have a private
8 attorney phone call that can last ten minutes. So I have yet
9 to have, since January, an attorney-client conversation that
10 the government is not privy to. And they want me to be ready
11 within less than two weeks. And you want me to be ready within
12 less than four weeks. I don't think that's fair.

13 THE COURT: All right.

14 MR. TOUGER: So I would ask the Court, at a minimum,
15 to adjourn this case from April 30th to May 30th.

16 THE COURT: Go ahead.

17 MS. MERMELSTEIN: Sorry, your Honor.

18 So I think we were somewhere in the middle of the
19 stipulation point.

20 THE COURT: Yes. To your stipulation, does that
21 affect the length of trial?

22 MS. MERMELSTEIN: It does, your Honor. There are so
23 many custodians at issue, I think we are talking about -- I
24 haven't counted up, I think we are talking about something like
25 40 custodians. So I think it does affect the length of the

I4ddgalc

1 trial, which is why we tried to resolve this with the
2 defendants early.

3 One thing we wanted to raise, your Honor, is that
4 obviously your Honor can't order the defendants to stipulate
5 but there are an enormous number of what seem to be
6 noncontroversial kinds of things -- emails provided pursuant to
7 a search warrant, documents provided by a bank -- that it would
8 seem silly to not have stipulations, but we would like to sort
9 of know where we stand.

10 Leaving that issue aside, assuming there are
11 reasonable stipulations and that the defendants may wish for a
12 limited number of custodians they want to question so we put on
13 a few, I think that my best guess is that the government's case
14 is about three weeks; maybe it goes a little into the fourth,
15 hard to say.

16 THE COURT: Is that including sitting a half day on
17 Friday or is that a four-day week, or did you not think it out
18 that way?

19 MS. MERMELSTEIN: I don't know how to think about that
20 time.

21 THE COURT: All right.

22 MS. MERMELSTEIN: Yes, I think if we sit half days
23 Fridays, then a little less.

24 I would note one scheduling matter in that regard,
25 which is the 28th of April is a Jewish holiday, it's a

I4ddgalc

1 Monday -- I'm sorry, of May. I lost track of the calendar.

2 THE COURT: It is Memorial Day, anyway.

3 MS. MERMELSTEIN: The 21st, I'm sorry, the Monday
4 before Memorial Day. So we would ask not to sit that day. We
5 were going to suggest that we would be happy to sit Friday to
6 make it up if your Honor wanted. But in any event, I still
7 think that we are talking about something like three weeks.

8 THE COURT: All right. Yes.

9 MS. NOTARI: Your Honor, I just wanted to note that
10 with regard to the stipulations, part of the problem is us
11 getting through the government's exhibits and 3500 materials to
12 know exactly where we stand with our -- what evidence we intend
13 to admit. So it is not something that we would -- I know in my
14 case I would love to get back to them, but I am just not in a
15 position -- I fully intend to get there, and I think my
16 colleagues agree with me that this adjournment of two weeks, or
17 whatever the Court can give us, will help facilitate all of
18 that.

19 MS. MERMELSTEIN: Your Honor, I'm sorry to bicker, but
20 the government produced exhibits in this case six weeks prior
21 to trial, which is vastly longer than almost any case in this
22 district. The defendants have had the exhibits for a month.
23 So -- and the point of doing that was in part to allow for this
24 kind of discussion. So I'm sympathetic to the fact that it
25 takes time to get through them, but I don't think that that is

I4ddgalc

1 sort of a reasonable answer.

2 MR. TOUGER: Does the government think we're not
3 reading the documents? Do they really think we said, oh, we
4 got the documents and we're not reading them?

5 THE COURT: This is not productive. Look, I was on
6 the CJA Panel. I know how difficult it is to meet the client
7 and have them review documents. I get it. So I understand it,
8 but I don't think that this back and forth is productive in any
9 way.

10 MR. TOUGER: I agree but --

11 THE COURT: But I will tell you that scheduling is an
12 issue here. I am sympathetic both to the health concerns and
13 to the ability of the defendants themselves to review
14 discovery. So even if and even though I will say it is true
15 that the government produced both 3500 material and the
16 exhibits far in advance of trial, and they are to be credited
17 for that, on the other hand, some of the defendants have not
18 been in a position to review that. And that is a concern. And
19 I understand that you've been trying to work to allow Mr. Hirst
20 to do that and there are specific issues with respect to John
21 Galanis and I get that.

22 But I will tell you scheduling is an issue. I have
23 trials scheduled from mid-July. I have, you know, things --
24 other, you know, trials in August. I have a whole host of
25 issues throughout the summer. So how long this trial is going

I4ddgalc

1 to take and an accurate assessment of that will help me
2 determine if I can give you more than two weeks.

3 So what I am going to ask you to do is I am going to
4 ask you to get back to the government on the stipulations or on
5 as many of them as you can. If you can do that -- I don't know
6 when you can do that. Can you do that -- you have to wait, I
7 guess, Mr. Touger, for your client.

8 MR. TOUGER: Your Honor, I would think that most of
9 those witnesses have nothing to do with Mr. Galanis.

10 THE COURT: OK.

11 MR. TOUGER: I am just assuming that.

12 THE COURT: If you could do that by tomorrow, I can
13 get back to you tomorrow on when this trial will start. But
14 you have to get back to the government --

15 MR. TOUGER: We can do it right now.

16 THE COURT: All right. Why don't you talk. Take a
17 minute now. Speak amongst yourselves. If any of you need
18 permission from your client, then you can let me know tomorrow
19 but take a minute.

20 (Defense counsel conferred)

21 (Continued on next page)

22 (Pages 58 through 75 SEALED)

I4ddgalc

(In open court)

THE COURT: Do you need any more time?

No. All right.

MR. SCHWARTZ: Judge, before we go back on the record, Mr. Archer was excused at 2 o'clock for an engagement.

THE COURT: Yes, absolutely.

All right. So any progress on stipulations as it may affect the length of trial? I mean, I'm concerned for a number of reasons, but, one, I think it is going to be really hard to choose a jury that can sit through Memorial Day and July 4th. So, I'm hoping if we -- I really would like to get it done before the 4th. I also have trials that I scheduled a very long time ago, starting on July 9th.

So, any progress?

MR. TREMONTE: Yes. We had constructive conversation amongst defense counsel and also with the government briefly. We're confident that, even though we don't have the specific documents in front of us, that the overwhelming majority of the stipulations will be agreed to in advance. To the extent that there may be a handful of custodian witnesses, I think everyone is in agreement that it will not meaningfully add to the trial time at all.

MS. MERMELSTEIN: So --

MR. TREMONTE: And just to finish the thought -- I'm sorry Rebecca -- the other thing we discussed is, you know,

I4ddgalc

1 from our perspective, respectfully, a month would solve a whole
2 host of problems, including in particular the issues relating
3 to Mr. John Galanis, because it would in fact afford him
4 sufficient time to be back here, based on the government's
5 representation that is in fact going to happen next week,
6 tested, and to recover with sufficient additional time for
7 Mr. Touger to prepare, and we are also cautiously optimistic --
8 again, because the government has been helpful in this
9 regard -- that Mr. Hirst will have access -- real access to
10 materials within a week.

11 MS. MERMELSTEIN: So that's helpful on the
12 stipulations. The government requested that we receive -- if
13 the entire stipulations are acceptable, we receive the signed
14 copies and, if not, we receive the answer on what the
15 defendants are willing to sign, because my experience is that
16 until the signed stipulations are in hand, the government can't
17 stop lining up these custodians. So, we need to know which
18 limited set they want us to call, and we need to know that now.

19 MR. TREMONTE: I'm confident that we can confer.

20 THE COURT: Can we set a date on that? That would be
21 really helpful if we just set a date by which you agree.

22 MR. TREMONTE: Wednesday of next week, your Honor?

23 THE COURT: Does that work? OK. Thank you. That is
24 helpful.

25 Yes.

I4ddgalc

1 MS. MERMELSTEIN: Your Honor, with respect to the time
2 period of the adjournment, I think for all the reasons your
3 Honor has said, there is no legal basis for needing one at all.
4 I think if your Honor intends to adjourn it a week or two,
5 obviously the government will try it when your Honor orders it
6 is to be tried, but there is an enormous difference from the
7 government's perspective between a one- or two-week adjournment
8 and the four weeks from now that seems to be floated, and we
9 really object to the four weeks. If you tell us it is
10 May 15th, or whatever that Monday is, we will be here. That
11 difference is enormous to us.

12 I also note that we produced our materials based on
13 this initial trial date. That puts our 3500 and our exhibits
14 in the hands of the defendants for far more time than had
15 really been agreed to. So, I think for the reasons that we
16 discussed and some others that we're happy to discuss not on
17 the record, the government really urges the Court not to
18 adjourn it more than two weeks.

19 THE COURT: All right. Yes.

20 MR. TOUGER: Your Honor, I just don't see the logic in
21 that last statement. So what they're saying is they wanted to
22 produce that stuff closer to trial so we would have come in
23 here and say we didn't have enough time to read all the
24 documents.

25 THE COURT: Look, you know what the law is on 3500

I4ddgalc

1 material, and as I said, I think the government is to be
2 commended for producing it early. That being said, I don't
3 find it particularly persuasive. I'm not offended by the
4 notion of defense counsel and defendants having more time to
5 prepare for trial. I think that is a good thing and not a bad
6 thing. That being said, you know, we had a trial date. I had
7 already granted one very lengthy adjournment. I am loath to do
8 it again.

9 The thing that, frankly, I'm most persuaded by -- and
10 for all the reasons I said, I don't think you are legally
11 entitled to one. On the other hand, there are these issues,
12 the health issues with respect to John Galanis, and there are
13 issues with respect to Mr. Hirst and Mr. Galanis actually being
14 able to review the materials and prepare for trial.

15 So, I'm going to adjourn the trial to May 21st.

16 Is that the date you said was a Jewish holiday?

17 MR. TOUGER: Monday is --

18 THE COURT: OK. So we will start May 22nd. And my
19 hope is that the trial is kept within a month. I don't know if
20 that is reasonable or not, but hopefully it will be completed
21 at the latest before, you know, the July 4th holiday. I will
22 tell you that I have -- one of those weeks is going to be
23 shorter. I have the Judicial Conference on June 13th. So it
24 may be that we -- I think I would sit for half a day on the
25 13th and then would not be sitting the 14th or the 15th.

I4ddgalc

1 MR. TOUGER: Your Honor, could I just make one
2 suggestion?

3 THE COURT: Yes.

4 MR. TOUGER: And I am thankful to the Court for the
5 adjournment.

6 Since the next weekend is Memorial Day weekend, why
7 don't we pick the jury on May 22nd and then start the trial on
8 that next Tuesday, and this way we are not telling the jury
9 this they are sort of taking up Memorial Day weekend. And I
10 think it gives us -- it saves us a couple of days. I know the
11 Court has basically cut the baby in half between two weeks and
12 a month, but it does --

13 THE COURT: I actually think if you come in on
14 May 21st, you are juror who has committed that you can serve
15 for at least two weeks, and so what they can't say if they come
16 in on the 21st is say I can't sit at all because of Memorial
17 Day. I mean, we could still sit half a day on the Friday --

18 MR. TOUGER: We are not sitting on the 21st, your
19 Honor. We are sitting on Tuesday, the 22nd. So all we are
20 asking for, it is going to take -- with five defendants, it is
21 probably going take a day at least to pick a jury. So
22 basically, what I ask --

23 THE COURT: You are asking me to give up that whole
24 week, basically.

25 MR. TOUGER: No. I am asking to pick a jury and then

I4ddgalc

1 start the trial the day after Memorial Day. I have spoken to
2 defense counsel and that seems -- I've also talked to defense
3 counsel, and the half day on Friday, we don't really know the
4 efficiency of that because it seems like we're going to be
5 doing this trial in three weeks. If you --

6 THE COURT: If you really thought we could try this in
7 three weeks, then I wouldn't sit on Fridays.

8 MR. TOUGER: I truly think we can try this case in
9 three weeks.

10 THE COURT: But that's not what I heard from
11 Mr. Schwartz, whose representation is it was going to be up to
12 three months. I know it is hard to predict.

13 MR. SCHWARTZ: That is just my prediction on what we
14 are getting from the government. I am not doing anything to
15 prolong the trial. But we got notice of 27 witnesses. We have
16 over a thousand government exhibits. I think we have three
17 government experts. We have four defense experts. It is going
18 to take a little bit of time.

19 THE COURT: All right.

20 MR. SCHWARTZ: When you are talking about
21 cross-examination, there are going to be orders of magnitude
22 longer than the direct, because what we heard from the
23 government a second ago before the break was that a majority of
24 their witnesses really pertain to only one defendant. I think
25 I'd ask you to consider that as you think about severance

I4ddgalc

1 because that is different from what we heard before. But I
2 think that's right. And most of these witnesses really do only
3 pertain to one person so there won't be duplicative
4 cross-examinations.

5 My skepticism has always simply been based on the fact
6 that given the scope of the crimes charged, the number of
7 witnesses and exhibits that the government has proffered, it
8 doesn't feel like three weeks. If they are still saying this
9 far out that it is a three-week trial, then I guess it is a
10 three-week trial.

11 THE COURT: All right. Yes.

12 MS. MERMELSTEIN: Thank you, your Honor. A few
13 things.

14 First of all, with respect to severance, those
15 witnesses -- just to be clear, those are witnesses we would
16 call on trial if every single defendant went to trial alone. I
17 just expect that with respect to some of them, the defense
18 counsel's argument will be you never met my client, you don't
19 know anything about them. So if they take it seriously, then
20 we would offer it because it relates to severance.

21 With respect to scheduling, it seems unfair to call it
22 splitting the baby since the government doesn't want any
23 adjournment. We just want two weeks. We still think we should
24 start the 14th; it makes an enormous difference to us. But if
25 we are going to start on the 22nd, we should pick the jury the

I4ddgalc

1 week before, I think. Let's pick a jury the prior week and
2 tell them to be here on Tuesday morning for openings so that we
3 can hit the ground running on the 22nd. That saves us a day,
4 maybe two, in a trial with this many defendants, and I think
5 that that's worth doing and I think it is worth sitting half
6 days on Fridays trying to --

7 MR. TOUGER: It takes away my ability to meet with my
8 client for those few days.

9 THE COURT: No. I understand.

10 I am going to start on the 22nd. We are going to
11 choose a jury on the 22nd or the 23rd, and I'm not going to
12 tell them to come back after Memorial Day. As I said, those
13 jurors will have committed to being free for two weeks. So
14 even though the court, of course, is closed on the 29th, I'm
15 going to assume that we're going to move forward.

16 The only question that I have -- and I'll make this
17 decision when I hear people out during voir dire -- is if we
18 should take off the Friday or not, just so that we can keep as
19 many people on the jury, or we should sit half a day on Friday.
20 As a general rule, though, I plan to sit half a day on Fridays.
21 I think we can do it from 10 to 1 and just take a very short
22 break, and so there will be no lunch break. As I said, there
23 may be, you know, one or two exceptions to that, and one of
24 those weeks where we are going to have a shorter week is the
25 week of June 11th. So that's the schedule. I am not going to

I4ddgalc

1 move it again, and that is the schedule.

2 Yes.

3 MR. TOUGER: Your Honor, so we could hit the ground
4 running, as the government likes to say, is have the
5 government -- because the MDC doesn't talk to me, so maybe the
6 government can talk to the MDC between now and Wednesday and
7 smooth the road, so to speak, so when Mr. Galanis does get
8 there, they are anticipating his arrival and they know the
9 issues as far as him having access to materials.

10 I have already burnt the CDs to give to him, so they
11 are ready to put into his attorney mail and give to him as soon
12 as he gets there. What I'm saying, your Honor, is just so
13 when -- we don't have the same problems as Mr. Hirst and we
14 waste two weeks getting to where Mr. Hirst is now.

15 THE COURT: I'm sure you will assist.

16 MS. MERMELSTEIN: Absolutely, your Honor. I will note
17 that we also have a new hard drive of all the discovery for
18 Mr. Galanis that is ready to go. I didn't think it would be a
19 good idea to send it to MDC before he arrives because I don't
20 know that it will be processed properly, but we will coordinate
21 that and do whatever we can. They don't work for us, but we'll
22 try and do that.

23 One other request from the government. I think
24 fairness dictates, given the agreed-upon schedules, that the
25 defendants still produce their exhibits to the government on

I4ddgalc

1 the date on which they agreed to produce them.

2 THE COURT: I agree. I agree.

3 So the defendant still have to produce their exhibits
4 on the same -- the date that was previously scheduled, which
5 was April --

6 MS. MERMELSTEIN: One week before the trial was to
7 begin.

8 THE COURT: OK. So that is April 23rd. So defendants
9 still have to produce all of their exhibits on April 23rd, and
10 I think that's fair.

11 There are a couple of things. I think we have to
12 reschedule the final pretrial conference. Also, we still have
13 some remaining issues. This has been a long session so I think
14 we should schedule something else for next week. We have to
15 address the motion to suppress -- Mr. Archer and Cooney's
16 motion to suppress and the crime fraud exception and other
17 related issues that relate specifically to Mr. Archer and
18 Cooney. Obviously, anyone is welcome to be there if you would
19 like to.

20 So, are you free next Thursday?

21 MS. NOTARI: Yes.

22 MR. TOUGER: In the afternoon, if that is possible.

23 THE COURT: OK. I mean, we could -- you know, I can't
24 do it in the afternoon, I could do it in the morning, but we
25 could just meet when the final pretrial conference was

I4ddgalc

1 originally scheduled, April 25th, at 3.

2 Is that all right, since you already had that on your
3 calendar? Is that good?

4 MS. MERMELSTEIN: Your Honor, I guess the only
5 question is -- and I don't know if your Honor is -- with
6 respect to suppression, that's fine.

7 THE COURT: Yes.

8 MS. MERMELSTEIN: We are waiting for answers on the
9 crime fraud and the privilege issues, and those are documents
10 that are not in our possession because we are still fighting
11 about them, so we are hesitate to wait that long.

12 THE COURT: Right.

13 MS. MERMELSTEIN: But if your Honor was otherwise
14 prepared to rule.

15 THE COURT: Yes. So let's -- what about noon on
16 Thursday, the 19th?

17 MS. NOTARI: That is fine.

18 THE COURT: Let's do that. I have a meeting at 1, so
19 we'll just keep it short.

20 MS. NOTARI: So is that instead of the 25th?

21 THE COURT: That is instead of the 25th. So the 25th
22 is canceled.

23 I assume you can't do 11:30, is that right?

24 MR. TOUGER: No.

25 THE COURT: OK. So we will just make it from 1 to 2

I4ddgalc

1 on the 19th.

2 MR. TOUGER: From 1 or noon, your Honor?

3 THE COURT: I'm sorry. From noon to 1 -- I apologize.
4 From noon to 1 on the 19th. And then we're canceling the 25th.
5 And then I will reschedule the final pretrial conference for
6 May 16th at 2 o'clock. OK?

7 And -- yes.

8 MR. MORVILLO: You raised this before. This is a very
9 minor issue. But to the extent that you were considering not
10 sitting on the Friday before Memorial Day --

11 THE COURT: Yes.

12 MR. MORVILLO: -- I think that is the right way to do
13 it. I think it will be much harder to get a jury that knows
14 that they have to be here on that Friday.

15 THE COURT: Right. You just want to know that in
16 advance?

17 MR. MORVILLO: Yes. I think that we are going to have
18 some very unhappy jurors if they have to sit that Friday.

19 THE COURT: So we won't sit that Friday. So let's not
20 sit that Friday. We will have three days to sit that week.
21 And then we'll have -- I will sit a half day, though, on Friday
22 starting the next week. So June 1st we'll sit a half day and
23 the other Fridays. OK? So we'll have three-and-a-half days
24 that week.

25 I think the last issue is discovery. And I know we

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1 had some email -- some letters back and forth about that. I
2 just want to remind the parties of their obligation to comply
3 with Rule 16 in good faith, and I don't know where we are on
4 the reciprocal discovery issue.

5 MS. MERMELSTEIN: Your Honor, we received yesterday
6 from Mr. Schwartz, I don't know the exact number, 50,000 or so
7 documents. The vast, vast majority, as his cover letter
8 represents, are Outlook calendars, so not really an enormous
9 number notwithstanding the numbers, and I think approximately
10 6,000 other sort of real documents. They haven't properly been
11 downloading from the site. We are still working on it. As
12 soon as we have them, we intend to produce them to the other
13 defendants.

14 THE COURT: OK. All right.

15 MR. TOUGER: What was that? I didn't hear the last
16 sentence.

17 MS. MERMELSTEIN: I'm sorry. As soon as we have
18 successfully acquired them ourselves, we intend to produce them
19 to everyone else.

20 THE COURT: OK. So are there any other issues we need
21 to discuss today?

22 MR. QUIGLEY: Your Honor, I think, in light of the
23 adjournment, just in an abundance of caution, we move to
24 exclude speedy trial time between now and May 22nd since that
25 is at the defendants' request. I'm not sure how much time has

I4ddgalc

1 clicked off the clock but just to be safe.

2 THE COURT: Yes. That application is granted until
3 the trial begins on May 22nd.

4 Yes. Mr. Morvillo.

5 MR. MORVILLO: The last time I was here I raised the
6 issue of not being able to hear. I still can't hear. My
7 hearing has not gotten better --

8 THE COURT: We are not going to be sitting in this
9 courtroom.

10 MR. MORVILLO: I understand. But the next time we
11 meet, can we meet where we are supposed to meet where we are
12 going to have the trial so at least I can figure out if I can
13 hear there or if I need to get --

14 THE COURT: I will try and get that courtroom. We
15 will look into it and just make sure another judge isn't using
16 it. But are you coming on the 19th?

17 MR. MORVILLO: I guess I am now.

18 THE COURT: OK. No. I mean just because it was
19 really related to --

20 MR. MORVILLO: I mean I wasn't planning on it, but if
21 you will be in the courtroom that you will be in --

22 THE COURT: What I was going to say is I will ask if I
23 can have it. I am trying a case there now, so it may be that
24 they let me keep it.

25 (Pause)

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1 It should be fine. So it is 110. So why don't we
2 plan to meet in Room 110 then.

3 And then during the course of the trial, you are just
4 going to have to kind of remind me by raising your hand or
5 otherwise for me to remind people to speak into the
6 microphones.

7 MR. MORVILLO: Will do.

8 THE COURT: OK. All right.

9 Anything else?

10 (Pause)

11 All right. Thank you. Have a nice afternoon.

12 MS. MERMELSTEIN: Thank you, your Honor.

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